No. 71-1553

in the
Supreme Court of the United States

OCTOBER TERM, 1972

JOHN J. GILLIGAN, et al.,
Petitioners

v.

CRAIG MORGAN, et al.,
Respondents

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE LAW REVISION CENTER

AS AMICUS CURIAE

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INDEX

	Page
TABLE OF AUTHORITIES	vii
INTEREST OF AMICUS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I.	3
II.	18
III.	22
CONCLUSION	26

BLEED THROUGH POOR COPY

TABLE OF AUTHORITIES

Cases Page

Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), aff'd per curiam, 371 U.S. 37 (1962) 23

Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924) 15

Brown v. Board of Education, 349 U.S. 294 (1955) 23, 24

Case of Ship Money, The King v. Hampden, 3 State Trials 825 (1637) 5, 21, 30

Chambers v. Hendersonville City of Board of Education, 364 F.2d 189 (4th Cir. 1966) 24

Chastleton v. Sinclair, 264 U.S. 543 (1924) 13

Constantin v. Smith, 57 F.2d 227 (E.D. Tex. 1932) 15

Cottonreader v. Johnson, 252 F. Supp. 492 (M.D. Ala. 1966) 25

Edmund Earl of Kent's Case (1327), in Hale, History of the Common Law 40-41 (2d ed. 1716) 4

Ela v. Smith, 71 Mass. (5 Gray) 121, 66 Am. Dec. 356 (Sup. Jud. Ct. Norfolk Co., 1855) 10

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914) 15

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 14

Griffin v. School Board of Prince Edwards County, 377 U.S. 218 (1964) 24

Grisham v. Hagan, 361 U.S. 278 (1960) 14

Hammond v. Brown, 323 F. Supp. 326 (N.D. Ohio, E.D. 1971); aff'd 450 F.2d 480 (6th Cir. 1971) 28

Houser v. Hill, 278 F. Supp. 920 (M.D. Ala. 1968) 24

Hyde v. Melvin, 11 Johns. 424 (N.Y. 1814) 10

Johnson v. Duncan, 3 Martin 530, 6 Am. Dec. 675 (La. 1815) 11

King v. Hampden, The Case of Ship Money, 3 State Trials 825 (1637) 5, 21, 30

Cases (Continued)

Page

Kinsella v. Singleton, 361 U.S. 234 (1960) 14

Krause v. Ohio, 31 Ohio St. 2d 132, ____ N.E. 2d ____ (1972) 27

Krause v. Rhodes, No. 71-1622 (6th Cir. 1972) 27

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 24

Local 309, United Furniture Workers v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948) 25

McConnell v. Hampton, 12 Johns. 203 (N.Y. 1815) 10

McElroy v. Guagliardo, 361 U.S. 281 (1960) 14

Middleton v. Denhardt, 261 Ky. 34, 87 S.W.2d 139 (1935) 15

Miller v. Rhodes, No. 71-1623 (6th Cir. 1972) 27

Morgan v. Rhodes, No. 71-1335 (6th Cir., Feb. 15, 1972) .. 22

Moyer v. Peabody, 212 U.S. 178 (1909) 12, 13

Moyer v. Peabody, 148 Fed. 870 (C.C.D. Colo. 1906) 13

NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966), cert. denied 385 U.S. 820 (1967) 24

O'Callahan v. Parker, 395 U.S. 258 (1969) 14

Refoule v. Ellis, 74 F. Supp. 336 (N.D. Ga. 1947) 25

Reid v. Covert, 354 U.S. 1 (1957) 14

Relford v. Commandant, 401 U.S. 355 (1971) 14

Rex v. Kennett, 5 Car. & P. 282, 172 Eng. Rep. 976 (1781) 7, 8

Rex v. Pinney, 5 Car. & P. 254, 263 n. (b), 172 Eng. Rep. 962, 967 n. (b) (1832) 9

Reynolds v. State Election Board, 233 F. Supp. 323 (W.D. Okla. 1964) 24

Russell Petroleum Co. v. Walker, 162 Okla. 216, 19 P.2d 582 (1933) 15

Scheuer v. Rhodes, No. 71-1624 (6th Cir. 1972) 27

BLEED THROUGH POOR COPY

Cases (Continued)

Page

Seaney v. State, 188 Miss. 367, 194 So. 913 (1940)..... 15

Smith v. Shaw, 12 Johns. 222 (N.Y. 1815) 10

State v. Coit, 8 Ohio Dec. 62 (Pickaway, G.P. 1897)..... 11, 20, 21

State ex rel. O'Connor v. District Court, 219 Iowa 1165, 260 N.W. 73, 99 A.L.R. 967 (1935)..... 15

Sterling v. Constantin, 287 U.S. 378 (1932)..... 10, 13, 15

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 24

Thomas Earl of Lancaster's Case (1327), 1 Hale, Pleas of the Crown 343-46 (1st Amer. Ed. 1847) 4

Toth v. Quarles, 350 U.S. 11 (1955) 14

United States v. Jefferson County Board of Education, 380 F.2d 385 (5th Cir. en banc), cert. denied, 389 U.S. 840 (1967) 24

United States v. Stewart, 27 F. Cas 1339 (Crim. Ct. D.C. 1857)..... 10

United States ex rel Palmer v. Adams, 26 F.2d 141 (D. Colo. 1928) 15

Williams v. Wallace, 249 F. Supp. 100 (M.D. Ala. 1965) 25

Wilson & Co. v. Freeman, 179 F. Supp. 520 (D. Minn. 1959)..... 15

Wise v. Withers, 7 U.S. (3 Cr.) 330 (1806) 10

Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir.) cert. denied 393 U.S. 940 (1968)..... 24

Constitutions and Statutes

	Page
Bill of Rights, 1 W. & Mary, sess. 2, c. 2 (1689)	5
Rule 54(c), Fed. Rules Civ. Pro.	26
1 Geo. 1, stat. 2, c. 5 (1714)	5
13 Hen. 4, c.7 (1411)	4
Magna Carta, c. 39 (1215)	4, 17
Ohio Rev. Code § 2923.55	20
Ohio Rev. Code § 5923.23	21
Ohio Rev. Code § 5923.24	21
Ohio Rev. Code § 5923.26	21
Ohio Rev. Code § 5923.37	20
Petition of Right, 3 Car. 1, c. 1, § 8 (1628)	4
5 Rich. 2, Stat. 1, c. 5 (1381)	4
5 U.S.C. § 552(c)	29
18 U.S.C. §§ 241-242	28
42 U.S.C. § 1983	27
U.S. Const., art. I, § 8,cl. 15; Art. IV, § 4	9

Other Authorities

3 Annals of Cong. 576 (1792)	16
1 Blackstone, Commentaries on the Laws of England 400 (1765)	6
3 Campbell, The Lives of the Chief Justices of England 421-31 (1831)	7
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Coke, Fourth Institute, c. XVII	4
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BLEED THROUGH POOR COPY

Other Authorities (Continued)

Page

7 Cong. Rec. 3894 (1878) 16

116 Cong. Rec. 27,339 (1970) 17

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6 Op. Att'y Gen. 466 (1854) 11

Other Authorities (Continued)

Page

21 Parliamentary History of England 688-98 (W. Cobbett ed. 1814) 7, 8

Report of National Advisory Commission on Civil Disorders (1967) 16, 17

Report of the President's Commission on Campus Unrest (1970) 15, 21, 28

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STATEMENT OF INTEREST OF AMICUS CURIAE

The interest of *amicus* The Law Revision Center in this litigation is set forth in the Motion for Leave to File, bound together with this brief, at page i *supra*.

The arguments of *amicus* in this brief support the position of Respondents, Craig Morgan et al.

SUMMARY OF ARGUMENT

This brief argues that the complaint in this case, fairly construed, states justiciable claims arising from the fact that Ohio by her statutes, orders, rules and practices uses and threatens to use her National Guard troops in civil disorders in a manner that violates historic and fundamental requirements of due process of law. The argument is that the due process violation is present on the face of the statutes and does not depend upon the unpredictable facts of particular disorders.

Part I of the brief summarizes very briefly (with reference to more exhaustive authority) the origin and development and repeated reaffirmation of the historic rule of due process that forbids the employment of military force to control civil disorders. It also explains the nuance of doctrine upon which American constitutional law on this point is based, according to which military units may be sued in civil disorders, but only if they are used as a civilian and not as a military force – that is, subject to civilian law and not subject to military law, controlled in every respect by local civilian officials and not merely by the chief executive as commander-in-chief, and subject to the same standards of civil and criminal liability for their actions that govern civilian personnel in similar situations. It demonstrates that this is the controlling contemporary rule of the American cases, even though this rule may not be consistently respected by legislation and executive practice.

Part II of the brief points out several respects in which, according to the allegations of the complaint, Ohio disregards the rule of due process for the use of military troops in civil disorders. This Part of the brief also points out particular Ohio statutory provisions which are the basis of Ohio's unconstitutional practice, which statutes appear to be wholly or partially void on their face.

Part III of the brief argues that in addition to declaratory relief against the unconstitutional statutes, orders, rules and practices of Ohio in this regard, the complaint states a claim appropriate for injunctive relief. It argues that in addition to injunctive relief responsive to the matters discussed in Parts I

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and II of this brief, it might also be appropriate for the District Court to grant the specific forms of relief with regard to training and equipment that were specifically asked in the prayer of the complaint. The propriety of that specific relief, however, is left to be argued more fully by Respondents in their own brief.

ARGUMENT

I.

THERE IS A JUSTICIABLE DUE PROCESS STANDARD, GIVEN SPECIFIC CONTENT BY SEVEN CENTURIES OF REPEATED REAFFIRMATION, AND RECOGNIZED BY THE DECISIONS OF THIS COURT AS WELL AS OTHER AMERICAN COURTS, AGAINST WHICH THE LAWS, ORDERS, RULES AND PRACTICES OF ANY STATE FOR THE USE OF MILITARY TROOPS IN CIVIL DISORDERS MUST BE TESTED.

In the year 1181 Henry II issued the Assize of Arms, ordering that all free men in England be sworn to arms. Almost from the date of the creation of this *jurata ad arma*—the body of men sworn to arms—English law drew a distinction between how armed force was to be used in civil situations and in war. As a force for defense of the realm in case of war, the *jurata ad arma* were placed under the control of military officials and were governed by rules of law outside the scope of the common law, rules that were administered by a prerogative tribunal called the Court of the Constable and Marshal. However, as a force for the arrest of malefactors and for the suppression of domestic unrest and disorder, the very same *jurata ad arma* were placed under the control of the sheriffs in their respective counties and were governed by the rules of the fledgling common law. In other words, the very same armed men constituted at once the *militia* and the *posse comitatus*, but the militia and the posse were entirely different entities in law, controlled by different officers, and subject to different rules of law (indeed, to different *kinds* of law). The details of this history are more fully set out in Engdahl, *Soldiers, Riots and*

Revolution: The Law and History of Military Troops in Civil Disorders, 57 Iowa Law Review 1, 2-5 (1971).

The essential distinction between governing by sheer force and prerogative, and governing according to law, was recognized when King John promised to deal with his nobles in accordance with "the law of the land." *Magna Carta*, c. 39 (1215). In the fourteenth century that pledge of due process was taken as authority by Parliament for its holding that it was unlawful for the King to seize traitors by military force, and try them and execute them by military process. *Thomas Earl of Lancaster's Case* (1327), in 1 Hale, *Pleas of the Crown*; 343-46 (1st Amer. Ed. 1847); *Edmund Earl of Kent's Case* (1327), in Hale, *History of the Common Law* 40-41 (2d ed. 1716). In 1381 the Peasant's Revolts were suppressed by the *jurata ad arma*. The peasants were suppressed, however, by measures of unrestrained force appropriate to the *jurata ad arma* in their role as a force of war, exceeding what the common law allowed to the same *jurata ad arma* in their role as the posse to suppress riots and disorders. The common law therefore would have punished the members of the *jurata ad arma*, were it not for the fact that King Richard II pardoned them specifically for their acts done *"sanz due proces de loye"* – without due process of law. 5 Rich. 2, Stat. 1, c. 5 (1381).

When the first English riot act was enacted in 1411, it provided for suppression of riots by the *posse comitatus* under the command of civil officers, and made no provision whatsoever for intervention of the *jurata ad arma* in their military as distinguished from this civilian role. 13 Hen. 4, c. 7 (1411). During the Wars of the Roses and under the Tudors, absolutist monarchs did suppress civil disturbances with military force, but legal scholars of that period and of our own agree that those actions were in violation of the law of the land. See Maitland, *Constitutional History of England* 266-68 (1908). What had been suffered under the Tudors was to cause revolution under the Stuarts. When Charles I in 1627 sent military troops instead of relying on the civilian *posse comitatus* to suppress riots in several towns, Parliament postponed all its other business to prepare, under the leadership of the former Chief Justice Lord Coke, the *Petition of Right of 1628*. That

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historic document declared that the practice of dealing with riots and rioters by military means was "wholly and directly contrary to the said laws and statutes of this your realm." 3 Car. 1, c. 1, §8. Later, in his landmark *Institutes of the Laws of England*, Coke elaborated upon this thesis, and added that for a soldier to kill a civilian under a claim of military authority, at a time when civilian courts were open, would be murder. Coke, *Third Institute*, c. VII, p. 52; *Fourth Institute*, c. XVII. It is true that the King's common law judges in *The Case of Ship Money, The King v. Hampden*, 3 State Trials 825, 844-46 (1637), eviscerated the Petition of Right's guarantee against domestic military prerogative; but that erroneous ruling was soon expunged in blood. When Charles on the authority of that decision persisted in employing military measures to deal with domestic problems, it lead directly to revolution and the execution of the King. Controversy over the control and use of the *jurata ad arma*—those men who at once formed the militia and the posse—was the precipitating cause of the great civil wars that began in 1642. See *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 11-14. After the Restoration, the due process principle that military measures must never be employed domestically so long as the civilian institutions of the law remain operable was reiterated by Lord Chief Justice Hale, *History of the Common Law* 39-40 (2d ed. 1716), and reconfirmed by enactment of the 1689 *Bill of Rights*, 1 W. & Mary, sess. 2, c. 2 (1689).

When England was beset with scattered riots and disturbances in protest of the Hanoverian succession in 1714, Parliament enacted a new riot act. While the new act was designed to repair various defects which the developments of three centuries had created in the old 1411 law, it made no change in the due process tradition that riots were to be suppressed only by civilian force. Just like under the 1411 statute, under the 1714 statute riots were to be suppressed by the *posse comitatus* under the control of the ordinary local civilian officers, and there was no authority for military intervention regardless how aggravated the circumstances might be. 1 Geo. 1, stat. 2, c. 5 (1714).

William Blackstone, writing on the eve of American independence, repeated the established due process principle, in

1 Blackstone, *Commentaries On the Laws of England* 400 (1765). Blackstone's restatement served to punctuate the colonists' assertion of their heritage of due process. The colonial charters had been drafted to reflect the recognition of the due process rule against military force in civil disorders. These charter provisions are analyzed in detail in *Soldiers, Riots and Revolution, supra,* 57 Iowa Law Review at 18-22. The explicit provisions of the colonial charters, together with an acute awareness of the due process tradition, explain why the colonists were so incensed when General Gage repeatedly employed military troops to suppress disorders in the colonies. The reason why the tragedy at Boston on March 5, 1770, became known as the Boston Massacre and served as the catalyst for revolution was not that the unruly mob of Bostonians were innocent of any wrongdoing. The reason, rather, was that the employment of *military* troops against even a riotous assembly found no warrant in the Massachusetts Charter and was a brazen affront to the colonists' right to be treated in accordance with due process of law.

The American patriots had specifically in mind the Boston Massacre and other instances of military force used in derogation of the due process principle, when they charged in their Declaration of Independence and other acts of their Continental Congress that the King had "affected to render the Military independent of and superior to the Civil Power," and had contrived to exempt from trial and punishment British troops accused of "murdering" disorderly colonists under color of military authority. See *Soldiers, Riots and Revolution, supra,* 57 Iowa Law Review at 26-28. When they undertook to draft their revolutionary state constitutions, these patriots included numerous provisions deliberately designed to preclude such hated domestic applications of military power. These provisions are analyzed in *Soldiers, Riots and Revolution, supra,* 57 Iowa Law Review at 28-31.

If the law had developed no further, it would be necessary to conclude today that units of the military forces can never be employed to control or suppress civil disorders. That, however, is not the case. The nuance of doctrine that is essential to understanding the modern due process requirements for

the use of military troops in civil disorders originated with Lord Chief Justice Mansfield in the year 1780.

The Lord Gordon Riots in London in 1780 lasted several days, and worked a great deal of destruction before they were finally suppressed when the King sent in military troops. When the mayor of London was afterwards tried for his failure to subdue the riot sooner, his defense was that no civilian force sufficient for the task was at hand, and that to have utilized soldiers would have been contrary to law and would have subjected him to criminal liability if the soldiers should harm anyone. *Rex v. Kennett,* 5 Car. & P. 282, 291-92, 172 Eng. Rep. 976, 981-82 (1781) (argument of Mr. Erskine for defendant). This defense, however, proved inadequate, because the judge at the trial was Lord Mansfield; and Mansfield instructed the jury in accordance with the novel doctrine which he had articulated in Parliament only days after the riots—a doctrine which Erskine in his argument declared had left the Lords in Parliament "planet-struck" when they heard the Chief Justice first propound it.

Mansfield had offered his doctrine as a reply to those Lords who protested that the King's use of soldiers to subdue the riots was a violation of the historic due process principle that military force may never be used to suppress civil disorder. Mansfield's speech to Parliament is reported in 21 *Parliamentary History of England* 688-98; (W. Cobbett ed. 1814); major excerpts from it are reprinted in 3 *Campbell, The Lives of the Chief Justices of England* 421-31 (1831). Mansfield acknowledged that riots could be suppressed only by civilian officers and the *posse comitatus,* all under the rules of civilian law, and could never be suppressed by military force. It will be remembered, however, that since the earliest period the same *jurata ad arma* that constituted the militia also constituted the legally and institutionally distinct civilian posse. Seizing this point, Mansfield argued that the same persons who were members of the army were also members of the posse; and he reasoned that, regardless whether they happened to wear army uniforms, they could be called upon to suppress a riot "not as soldiers, but as citizens."

> The persons who assisted in the suppression of these tumults are to be considered mere private individuals, acting as duty required. My Lords, we have not been living under martial law, but under that law which it has long been my sacred function to administer. For any violation of that law, the offenders are amenable to our ordinary courts of justice, and may be tried before a jury of their countrymen. Supposing a soldier, or any other military person, who acted in the course of the late riots, had exceeded the powers with which he was invested, I have not a single doubt that he may be punished, not by a court-martial, but upon an indictment to be found by the grand inquest of the City of London or the County of Middlesex, and disposed of before the ermined judges sitting in Justice Hall at the Old Bailey.
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> . . .
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> . . . The King's extraordinary prerogative to proclaim martial law (whatever that may be) is clearly out of the question. His Majesty, and those who have advised him (I repeat it), have acted in strict conformity to the common law. The military have been called in—and very wisely called in—not as *soldiers*, but as *citizens*. No matter whether their coats be red or brown, they were employed, not to subvert, but to preserve, the laws and constitution which we all prize so highly.

21 *The Parliamentary History of England* 688-98 (W. Corbett ed. 1814) (emphasis in original).

This Mansfield doctrine promptly became the law in England. It was the rule applied by Lord Mansfield himself in the trial of Mayor Kennett of London in *Rex v. Kennett*, *supra*, and it was applied again by Lord Chief Justice Tindal in charging the Bristol grand jury after the Bristol riots of 1831. Tindal told the grand jury that the role of the military in a riot situation was different from that in a war; that on riot duty the local civil officer (e.g., the mayor or sheriff or magistrate) was in command, and the governing rules of law and the standards of culpability for acts must be the same for the soldiers as they

would be for civilians engaged in suppressing a riot. *Rex v. Pinney*, 5 Car. & P. 254, 263 n. (b), 172 Eng. Rep. 962, 697 n. (b) (1832).

More significant than any later developments in England, however, is the fact that the Mansfield doctrine was adopted as the foundation of federal constitutional and statutory provisions in the United States. The Constitution contains provisions which, if read in ignorance of the Mansfield doctrine, seem to contemplate the use of military troops as a military force in civil disorders. U.S. Const., art. I, §8, cl. 15; Art. IV, §4. If that were the true meaning of these constitutional provisions, it would be strange indeed that the revolutionary passions had so far subsided by 1787 that the ancient rule of due process re-purchased by bloodshed only a decade before could be so casually surrendered. But the error of that construction becomes compellingly clear when one examines carefully the language that was used by the framers, the origins of that language in the Convention, the discussions that took place during the period of its ratification, the deliberations which led to the Bill of Rights, and the debates and enactments of the first Congresses when they implemented the constitutional provisions in question. These enlightening sources are analyzed in detail in *Soldiers, Riots & Revolution, supra*, 57 Iowa Law Review at 35-49. What they demonstrate convincingly is that the Constitutional Convention and the first Congresses were acutely aware of the Mansfield doctrine and deliberately and specifically designed the language of Constitution, Bill of Rights, and statutes in a way that to them seemed clearly to utilize that doctrine.

Their experience since 1776 had indeed taught these statesmen the need for an effective domestic peace-keeping force; and since the laymen's posse was a clumsy and ill-organized body, but professional civilian police forces were still unknown, the idea of utilizing organized and disciplined militia for this purpose held obvious appeal. Under the Mansfield doctrine they could make use of this body as a civilian force under civilian law and local civilian command without violence to their newly reclaimed due process right against domestic use of military force. Read candidly and with care, the Constitution

and original federal statutes provide in accordance with the historic rule of due process that military troops may be used domestically *as soldiers* only when civilian law and government have ceased to be capable of functioning—in terms of the common law criterion, when the courts are closed.[1] Otherwise, in civil disorder or riot however unlawful or extreme, military troops, whether individually or in units, and whether uniformed or not, may be utilized only in accordance with the Mansfield doctrine: as civilians, subject to the same laws that govern civilian emergency control personnel, subordinate in every respect to the local civilian officials, and civilly and criminally responsible for their acts exactly as civilian personnel would be. See *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 42-49.

In proof of this original constitutional understanding, militiamen and members of the national armed forces when employed domestically to enforce the law or restore order were held by courts to be essentially civilians, not soldiers, and to be subject to control by local civil officials and governed by the rules of civilian law. They were in fact conceived of as members of the civilian posse. See *United States v. Stewart*, 27 F. Cas. 1339, 1342-43 (Crim. Ct. D.C. 1857); *Ela v. Smith*, 71 Mass. (5 Gray) 121, 142, 66 Am. Dec. 356, 366 (Sup. Jud. Ct. Norfolk Co., 1855). Soldiers were held liable for official acts they committed against civilians in violation of civilian laws, even though they acted under military orders. *Wise v. Withers*, 7 U.S. (3 Cr.) 330, 337 (1806); *Hyde v. Melvin*, 11 Johns. 424 (N.Y. 1914); *McConnell v. Hampton*, 12 Johns. 203, 204-07 (N.Y. 1815); *Smith v. Shaw*, 12 Johns. 222, 231 (N.Y. 1815). The Supreme Court of Louisiana branded as "preposterous" the notion that a military commander could exercise any authority whatsoever

1. The common law criterion has been adopted in American law; see, *e.g.*, *Sterling v. Constantin*, 287 U.S. 378 (1932). Because in modern times judges do not ride off to war with their King, and may exercise judicial powers even outside their courtroom, a criterion less mechanical and more considerate of the policy of the common law rule would be whether civilian officials and institutions (including military personnel employed as a *civilian* force) are incapable of restoring order.

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in derogation of the civilian law and its local officials. *Johnson v. Duncan*, 3 Martin 530, 6 Am. Dec. 675 (La. 1815). The Attorney General of the United States, explaining the practice of 1854, made specific reference to Lord Mansfield's doctrine. 6 *Op. Att'y Gen. 466* (1854).

Even in Ohio this fundamental rule of due process as adapted through the Mansfield doctrine was recognized and applied by the courts. An Ohio court said in 1897 that a National Guard colonel and his regiment called out to help enforce the laws could

> act as an armed police only, subject to the absolute and exclusive control and direction of the magistrates and other civil officers designated in the statutes, as to the specific duty or service which they are to perform; nor can the sheriff or magistrate delegate his authority to the military force which he summons to his aid, or vest in the military authorities any discretionary power, to take any step or do any act to prevent or suppress a mob or riot.

State v. Coit, 8 Ohio Dec. 62, 63 (Pickaway, G.P. 1897).

It may seem to have been ill-advised for the founding fathers to invest such reliance upon the nuance of doctrine invented by Lord Chief Justice Mansfield. Ever since the Reconstruction Radicals succumbed to the apparent expediency of using military force to impose their high-minded designs upon the South *after* peace had been restored, one excuse after another has been found by legislators and executives, both state and federal, to justify recourse to uniquely military force as an instrument of domestic policy. This historical development in legislation and practice since the Civil War is traced in considerable detail in *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 55-64, and in The Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders*, 43 Univ. of Colo. Law Review 399, 408-16 (1972). The subtlety of the Mansfield doctrine and the deceptive simplicity of statutory and constitutional provisions authorizing the use of troops have given this unconstitutional practice a color of legitimacy; and in the nature of events, it has been difficult and uncommon for judicial challenges of the practice to be made. But if the

Mansfield doctrine is a subtle or easily neglected rule, it is still the only alternative to being impaled upon either horn of an unhappy dilemma; for, without the Mansfield doctrine, one must either conclude that military troops may never in any capacity be used in civil disorders, (which was the pre-Mansfield due process rule), or else renig on seven centuries of history, the hardest-fought struggles of our English and colonial ancestry, and our unique constitutional safeguard against oppressive military regimes.

Except in a handful of ill-conceived decisions that ignored the whole course of due process history on this matter, the American courts which have considered issues arising from the domestic use of military troops have held in accordance with the due process rule that demands subordination to civilian law and officials. The cases are too numerous to list here. Those holding *contra* the due process rule are cited in *Soldiers, Riots and Revolution, supra,* at 65 n. 318. Examples of the far more numerous cases holding in *accord* with the due process rule (including more recent cases from jurisdictions which had earlier held *contra*) are cited and discussed in *Soldiers, Riots and Revolution, supra,* at 67 n. 319.

The most flaunted of the decisions in derogation of the due process rule is that in *Moyer v. Peabody*, 212 U.S. 178 (1909). But *Moyer*, while never explicitly overruled, has been so distinguished and reinterpreted by subsequent Supreme Court decisions as to have lost every bit of its force as precedent.

In *Moyer* the Court held that in a state of "insurrection" military forces could lawfully be employed *as soldiers*. If by "insurrection" were meant a situation where the civilian institutions and officials had been rendered incapable of functioning, this would have been consistent with the due process rule. However, in *Moyer* the Court *per* Justice Holmes held that a governor's finding that an insurrection existed was conclusive and could not be questioned in court. That meant that a governor could declare a riot or any lesser disorder or even (as on the facts in *Moyer)* an anticipated future disorder to constitute an insurrection, and escape all judicial review of his subversion of the due process rule. Holmes himself soon drew

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back from this untenable proposition, observing in *Chastleton v. Sinclair*, 264 U.S. 543, at 547 (1924), that a court cannot ignore the obvious incorrectness of a declaration by another branch when the validity of what is done depends upon the truth of what is declared. And in *Sterling v. Constantin*, 287 U.S. 378 (1932), notwithstanding *Moyer* the Court reviewed the facts which a governor had proclaimed to constitute an "insurrection," held they did not, and found the governor's military acts in derogation of civilian laws and officials to be unlawful.

Where an "insurrection" existed, the Court in *Moyer* had held, military troops could lawfully imprison or even shoot citizens "without sufficient reason." 212 U.S. at 84. But in *Sterling v. Constantin* the Court took a different view of the facts of *Moyer*, finding "sufficient reason" in the fact that "In [*Moyer*] it appeared that the action of the Governor had direct relation to the subduing of the insurrection . . .",[2] and cautioned that "the general language of the [*Moyer*] opinion must be taken in connection with the point actually decided." 287 U.S. at 400. The point which *Sterling* regarded *Moyer* as having decided was not that soldiers could act or be authorized to act "without sufficient reason," but only that they could act in ways that on reasonable reflection could be judged to be directly related to their mission; and even this was a standard to be applied in genuine "insurrection," not in mere civil disorders or riots.

So while *Sterling* managed to avoid overruling *Moyer* in terms, it did completely destroy *Moyer* as a precedent for the use of military troops without subordination to civilian law and local officials in civil disorders, in derogation of the due process rule. Further evidence of the determination of the Supreme Court in *Sterling* to reaffirm the due process requirements is the Court's quotation and endorsement of some of

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2. Thus the Supreme Court in *Sterling* took the same view of the facts in *Moyer* that the Circuit Court in *Moyer* had taken, finding contrary to the allegations in the complaint that the arrest and detention of *Moyer* had been reasonable. See *Moyer v. Peabody*, 148 Fed. 870 (C.C.D. Colo. 1906).

the eloquent language of the opinion in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), which vigorously articulated the due process rule. See 287 U.S. at 402-03.

In a series of recent cases, this Court has restricted the "judicial" power of the military over civilians. *Relford v. Commandant*, 401 U.S. 355 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969); *McElroy v. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v. Quarles*, 350 U.S. 11 (1955). The principle of civilian due process which has found expression in these recent cases is exactly the same historic anti-militaristic principle that forbids the "executive" use of military troops in civil disorders in any way other than as a subordinate *civilian* force, governed by and accountable under civilian law, and under the complete control of the same local civilian officials who would be responsible if military troops had not been used.

Independently of their status as reserve components of the armed forces of the United States, National Guard units, which are the organized historic militia of the states, constitute an organized body of manpower that may be utilized in compliance with state law for a wide variety of purposes: from a state military defense force against sudden invasion or genuine insurrection, at one extreme, to a manpower substitute for striking garbage haulers, at the other extreme. National Guard troops may be used to assist in case of natural disaster, to direct traffic after a football game, to search the woods for lost campers or downed fliers, to exterminate grasshoppers or other pests, or to suppress riots or control other civil disorders. This organized body of manpower constitutes a valuable resource of a state for many purposes, and the federal constitution places absolutely no restraint upon the discretion of state executives, pursuant to valid state law, to employ this organized manpower whenever they consider it desirable. Consequently, the Court of Appeals in this case was correct in rejecting Respondents' request for an injunction against the governor's "premature" calling out of the National Guard, although the reasons and citations given by the Court of Appeals were not apropos.

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What due process requires is not that a state refrain from making use of this convenient body of manpower, but only that the state employ it strictly as a *civilian* force—i.e., subject to the same law with respect to rights, duties, and liabilities that governs civilians in the same circumstances, subject to control in every aspect of their activity by the ordinary local civilian officials, and exempt from the rules, sanctions, and tribunals of military law. Under due process, the National Guard may be used domestically as a *military* force only under the extraordinarily rare circumstances of foreign invasion, or genuine insurrection which renders inoperable the institutions and offices of the civilian law. The most aggravated riot falls considerably short of this extreme. Hence the courts, while never restraining a state from employing the organized manpower of the National Guard, have time and time again held that such troops could not be employed as a military force, superseding ordinary civilian law, displacing local civilian officials, or operating independently of the legal rights, duties, and liabilities which govern civilians. E.g., *Sterling v. Constantin*, 287 U.S. 378 (1932); *Wilson & Co. v. Freeman*, 179 F. Supp. 520 (D. Minn. 1959); *Constantin v. Smith*, 57 F.2d 227, 236 (E.D. Tex. 1932); *United States ex rel Palmer v. Adams*, 26 F.2d 141, 144-45 (D. Colo. 1928); *State ex rel. O'Connor v. District Court*, 219 Iowa 1165, 260 N.W. 73, 99 A.L.R. 967 (1935); *Middleton v. Denhardt*, 261 Ky. 34, 87 S.W.2d 139 (1935); *Bishop v. Vandercook*, 228 Mich. 299, 200 N.W. 278 (1924); *Seaney v. State*, 188 Miss. 367, 194 So. 913 (1940); *Ex parte McDonald*, 49 Mont. 454, 143 Pac. 947 (1914); *Russell Petroleum Co. v. Walker*, 162 Okla. 216, 19 P.2d 582 1933). These and numerous additional cases are discussed in *Soldiers, Riots and Revolution, supra*, 57 Iowa Law Review at 67-70 n. 319.

Military troops operating without subordination to civilian law and local civilian authorities have always been viewed by Americans as unacceptable and abhorrent in civil disorder situations. For this reason, indeed, it has been repeatedly observed that their use in this fashion is counterproductive. This was documented with regard to the National Guard troops employed, under Ohio's laws here being challenged, at Kent State University in May, 1970. *Report of the President's Commission*

on Campus Unrest 250-74, 288 (1970). The same phenomenon was observed more generally by the National Advisory Commission on Civil Disorders, and noted in its *Report* at 502-03 (Bantam Books ed. 1968). But it was not a new observation. Troops were used in the same unacceptable fashion during the Reconstruction era, and General Halleck, in his 1870 report on the domestic use of troops during the era, observed that

> the use of troops in executing judicial process and enforcing the revenue and other civil laws seemed to increase rather than diminish the apparent necessity of resorting to such force in civil matters. The ill-disposed become more and more exasperated at being coerced by a force which they think has been unconstitutionally employed against them . . . .

7 *Cong. Rec.* 3894 (1878) (quoted in remarks of Mr. Hewitt). Indeed, when the first Congress debated the utilization of militiamen in civil disorders, congressmen who failed to perceive the nuance of the Mansfield doctrine responded that using military troops to enforce the laws "in a free state, where the people have been taught to look upon the right of refusing submission to unconstitutional acts, may excite insurrections much easier than quell them." 3 *Annals of Cong.* 576 (1792) (remarks of Mr. Page). See also *id.* at 579 (remarks of Mr. Kittera). Contemplating their use as a military force and recalling such incidents as the Boston Massacre, Congressman Page continued: "It should be remembered that the doctrine now contended for [allowing militia to be used to control disorders] is that very doctrine which dismembered the British Empire. Sir, it would have been happy for Britain if this doctrine had never been taught in that Kingdom." *Id.* at 576.

Some lessons are not easily learned, or are easily forgotten. Military troops were used to quell labor disturbances earlier in this century, giving rise to a number of the cases cited above as reaffirming the rule that they could only be used as civilians. More recently, however, the trend of legislation and practice in Ohio and elsewhere has been toward the seeming expedient of utilizing troops as a supervening military force. In this fashion their use has become alarmingly common during the

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past five years. The use of military troops in civil disorders had been quite uncommon until the urban riots of 1967. See *Report of the National Advisory Commission on Civil Disorders* at 497 (Bantam Books ed. 1968). But between January, 1968, and May, 1970, they were employed in civil disorders in the several states on no less than 324 occasions. Testimony of Maj. Gen. Winston P. Wilson, Chief of the National Guard Bureau, Before the President's Commission on Campus Unrest, reported at 116 *Cong. Rec.* 27,339 (1970). No state has made more frequent use of troops than Ohio. The National Advisory Commission on Civil Disorders found in 1968 that both National Guard and civilian officials were unsure of their relative command responsibilities when military troops were used. *Report, supra,* at 518.

When Americans respond in outrage to the presence of men and machines of war on a college campus or a ghetto street, no less than when they lament the military suppression of a freedom movement in Hungary or a demonstration in Greece, they are expressing a fundamental antipathy to prerogative force that has been a proud and prominent part of our culture since the time of *Magna Carta.* What is abhorrent is not the color of the uniforms, nor the fact that the troops may be armed, nor even necessarily the fact that their equipment may differ from that which civilian police ordinarily employ. What makes the use of military troops in civil disorders–in the manner in which Ohio and other states have in recent years come to employ them–utterly abhorrent to the American conscience is the fact that they supersede ordinary law, operate as an occupying force under military law, give only such deference as they might choose to local civilian officials, and claim a shield of immunity and hence irresponsibility for their actions that no civilian officer could pretend to wear.

II.

RESPONDENTS, ON THEIR COMPLAINT IN THE DISTRICT COURT, ARE ENTITLED TO A DECLARATORY JUDGMENT THAT IN CERTAIN FUNDAMENTAL RESPECTS THE LAWS, ORDERS, RULES AND PRACTICES UNDER WHICH OHIO HAS USED AND STANDS READY TO AGAIN USE ITS MILITARY TROOPS IN CIVIL DISORDERS ARE INVALID, BECAUSE IN CONFLICT WITH THE REQUIREMENTS OF DUE PROCESS OF LAW.

Ohio employs her National Guard troops *as soldiers* in civil disorders, in defiance of the requirements of due process of law. They were used thus unconstitutionally under former Governor Rhodes, the original defendant in this action, at Kent State University in May, 1970, with tragic consequences too notorious to require elaboration here; and Governor Gilligan is allegedly ready to thus unconstitutionally employ them again whenever he feels that circumstances demand.

The most prominent allegations of the complaint assert that Ohio National Guardsmen are inadequately and improperly trained and are inappropriately equipped for civil disorder duty. The dissent in the Court of Appeals concluded, and Petitioner State of Ohio asks this Court to rule, that those allegations pose a non-justiciable issue. But the complaint *also* sufficiently alleges facts raising *other* issues under the due process principle examined in Part I of this brief, and these are questionably justiciable and repeatedly adjudicated issues. The question whether it would be appropriate for a federal court to undertake the kind of detailed oversight of training and weaponry that was specifically sought by the prayer of the complaint, is a question that is dealt with briefly in Part III of this brief. Regardless of that, however, there are issues that are raised and essential relief that can be given under the complaint, without any of the difficulties that caused Judge Celebrezze to dissent below.

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The portions of the complaint which raise the unquestionably justiciable due process issues are the following (excerpts from the complaint as quoted in the Court of Appeals opinion):

> In addition, defendants have failed to instruct and order Ohio National Guard troops to limit their use of deadly force during civilian disorders to those instances in which deadly force could lawfully be used by police officers.
>
> . . .
>
> Because of the past actions of defendant's agents and defendants' continued excessive use of Ohio National Guard troops to displace civilian authority during campus disorders, there remains a very real threat that plaintiffs and other students will be subjected to similar beatings and detentions in the future and thereby be deprived of the same rights [as were lost at Kent State].
>
> . . .
>
> [Those actions] were not legitimatized by the application of concepts of Martial Law, because there was neither an invasion nor breakdown of civilian authority. Moreover, to the extent that any provision of Ohio law either authorize the imposition of Martial Law except during the time of invasion or breakdown of civil authority, or authorize a suspension of First Amendment rights as a consequence of the declaration of Martial Law, lawful or otherwise, they violate the First and Fourteenth Amendments to the United States Constitution. Defendants' past action in ordering Ohio National Guard troops to break up lawful assemblies creates a real threat to plaintiffs and other students that, if they participate in lawful activities they will be assaulted, killed, injured or unlawfully detained by Ohio National Guard troops.

In addition, the complaint challenged the validity of the rule of immunity under which the Ohio National Guard operates in civil disorders. The Court of Appeals was undoubtedly correct in its holding that the particular statute to which the

complaint made specific reference (Ohio Rev. Code § 2923.55)—if it is construed as the Court of Appeals construed it—meets no constitutional impediment; but there is an additional immunity statute in Ohio which cannot pass constitutional muster. Ohio Rev. Code § 5923-37, enacted in 1967, creates a special immunity specifically for National Guardsmen, much more generous than any immunity that could be validly extended to civilians. It purports to immunize guardsmen in civil disorders even for acts that can find no support or justification in reason, leaving them laible only for wilful and wanton misconduct.

Fairly construed, these allegations in the complaint assert that Ohio employs and threatens to employ her National Guard in civil disorders as a supervening military force, displacing ordinary local civilian authority, unrestrained by the rules of civilian law that govern civilian authority, and immunized from liability for any but wilfully or wantonly unlawful acts. If these allegations are true, it means that Ohio uses and threatens to use her National Guard in civil disorders in their capacity *as soldiers*, in direct defiance of the requirements of due process of law.

Ohio herself at an earlier day acknowledged and respected the requirements of due process in this regard. See *State v. Coit, supra.* But this complaint alleges (and Ohio's current statutes and orders bear witness) that Ohio has departed from the due process requirement and now employs military force in violation of the Constitution's command. This complaint surely states a claim upon which, at the very least, declaratory relief can be granted.

At the trial which must be allowed on this complaint, there may emerge several other specific particulars in which Ohio's laws, orders, rules and practices concerning military troops in civil disorders are inconsistent with the due process principle examined in Part I. Some major points, however, seem apparent already. The special National Guard immunity statute for civil disorders, Ohio Rev. Code § 5923.37 is certainly void on its face. See The Law Revision Center, *A Comprehensive Study of the Use of Military Troops in Civil Disorders*, 43

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Colorado Law Review 399, at 414-16 (1972); see also Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 Colorado Law Review 1 (1972). Furthermore, insofar as Ohio Rev. Code §§ 5923.24 and 5923.26 apply to civil disorders, as distinguished from genuine insurrections, and purport to subject guardsmen to the discipline of military law and courts martial for their actions in such disorders, they must be held to be void as against due process. And perhaps most important, Ohio Rev. Code § 5923.23 must be held void as falling short of the requirements of due process, by purporting to authorize National Guard officers to rely on their own discretion as to "mode and means of execution," allowing civil authorities only to "designate in general terms the particular objects to be accomplished." When the Ohio court in *State v. Colt, supra*, ruled that this degree of independent discretion in the military commander was impermissible, it was not merely applying an old-fashioned rule of practice that could be changed by the legislature by enacting this 1953 statute. Rather, it was applying the time-honored principle of due process which our revolutionary forebears and also Lord Chief Justice Mansfield, Lord Chief Justice Hale, Lord Chief Justice Coke, the Parliaments of 1627 and 1327, and even the Barons at Runnymeade, had fought some of their greatest struggles to nurture and preserve. Ohio sought to change this ancient rule in favor of an easier rule of military discretion; but due process forbids it. As the facts that were found by the President's Commission on Campus Unrest with respect to the Kent State affair in Ohio in 1970 attest, under this statute Ohio military officials give local officials only such deference as they like, and proceed to take over and exercise dominant control as an independent force, even in disregard of the wishes of civilian officials. See *Report of the President's Commission on Campus Unrest* at 245, 250, 256, 258, 259-64 (1970).

Unless this Court is prepared to ignore the lesson of *The Case of Ship Money, The King v. Hampden, supra*, and close its eyes to Ohio's defiance of the anti-militaristic principles of due process, it must hold that the complaint in this case entitles Respondents at least to declaratory relief.

III.

INJUNCTIVE RELIEF AGAINST THE FUTURE USE OF THE OHIO NATIONAL GUARD IN CIVIL DISORDERS UNTIL AFTER THE EFFECT OF OHIO'S UNCONSTITUTIONAL LAWS, ORDERS, RULES AND PRACTICES HAS BEEN EFFECTIVELY COUNTERACTED BY NEW AND VALID LAWS, ORDERS, RULES AND PRACTICES MAY BE APPROPRIATE. IN ADDITION, SOME OF THE SPECIFIC ORDERS SOUGHT IN THE PRAYER OF RESPONDENT'S COMPLAINT MAY BE APPROPRIATE.

The declaratory relief discussed in Part II of this brief could be granted by the District Court without any of the difficulties remarked upon by Judge Celebrezze in his dissent in the Court of Appeals. Judge Celebrezze found Respondents' cause of action to raise non-justiciable political questions "to the extent that it requires judicial intervention in National Guard training and weaponry." *Morgan v. Rhodes*, No. 71-1335, at slip sheet opinion p. 21 (6th Cir., Feb. 15, 1972) (Celebrezze, J., concurring in part and dissenting in part). And he observed further that "Any such injunctive relief apart from the training and weaponry of the Guard, would seemingly avoid the political question problem discussed above." *Id.* at 23, Judge Celebrezze went on to conclude that, as he interpreted the grounds of the complaint, beyond the challenge to training and weaponry there was only a challenge to the propriety of National Guard acts in *certain* circumstances, which acts would not be categorically impermissible in *any and all* civil disorder circumstances. On this too-narrow interpretation of the complaint, Judge Celebrezze concluded that the issue was non-justiciable; but he added that, "[w]ere any of the conduct challenged in the present complaint the type which could never be justified in the quelling of civil disorders, I am certain that injunctive relief should similarly be available to prevent its recurrence." *Id.* at 25.

The problem was that Judge Celebrezze took too narrow a view of the complaint. As explained in Part II of this brief, fairly construed this complaint puts in issue the validity under due process of several statutes, standing orders, rules, and

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continuing practices of the Ohio National Guard for civil disorders, *on their face.* The challenge is not merely to certain acts in certain circumstances, but to statutes, orders, and practices in derogation of civilian law and officials that are unconstitutional on their face in *any* circumstances of civil disorder. The specific circumstances and events of May, 1970, detailed in the complaint, simply constitute concrete illustrations of the vices which inhere in the objectionable laws, orders, rules and practices on their face.

Declaratory relief against the objectionable laws, orders, rules and practices is clearly warranted and confronts no justiciability barriers: that is sufficiently demonstrated in Parts I and II of this brief. In addition, however, appropriate injunctive relief against those same laws, orders, rules and practices, or against any use of the Ohio National Guard in civil disorders so long as those laws, orders, rules and practices and their pernicious effects remain, would be appropriate. The task of fashioning specific terms of an injunction is perhaps best left to the District Court after trial; but it seems clear that such relief may even go so far as to forbid use of the Ohio National Guard in civil disorders until such time as Ohio has revised her statutes, orders, rules, and plans for National Guard use in civil disorders sufficiently to guarantee, to the satisfaction of the court, that Ohio's troops will be employed in such disorders only as a strictly *civilian* force, completely subordinate in every respect to local civilian officials, governed by the same rules of law that govern civilian personnel in civil disorders, and liable both civilly and criminally for any wrongdoing to the same extent as any civilian in the same circumstances.

There can be no doubt of the propriety of such relief. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education,* 349 U.S. 294, 300 (1955). "The aim of equity is to adapt judicial power to the needs of the situation. Thus relief in matters of public, rather than private, interests may be quite different from that ordinarily granted." *Alabama v. United States,* 304 F.2d 583, 591 (5th Cir. 1962), *aff'd per curiam,* 371 U.S. 37 (1962). The relief which plaintiffs demand

is exactly the sort of relief that has been routinely awarded and consistently approved in legislative reapportionment and school desegregation cases, and the great breadth and flexibility of remedies that federal courts have employed in those fields is well known. See, e.g., *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *United States v. Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. *en banc*), *cert. denied*, 389 U.S. 840 (1967). State officials have been directed to draft acceptable regulatory provisions while the court retains jurisdiction for purposes of supervision. E.g., *Chambers v. Hendersonville City Board of Education*, 364 F.2d 189 (4th Cir. 1966). Where that has not been sufficient, the federal courts have stepped in to draft and implement rules of their own making, binding upon the state and its officers–even in reapportionment cases where the effect of this federal equity interposition may be to dramatically alter the political organization of a state. E.g., *Reynolds v. State Election Board*, 233 F. Supp. 323 (W.D. Okla 1964). From the very outset of the school desegregation problem, the United States Supreme Court has maintained that federal courts under their equity powers can see to the "revision of local laws and regulations which may be necessary" to accomplish desegregation; federal courts have full power "to take such proceedings and order such orders and decrees . . . as are necessary and proper" to accomplish compliance with the Constitution's command. *Brown v. Board of Education*, 349 U.S. 294, 301 (1955). Indeed, the Supreme Court has authorized even greater intrusions than granting relief to the plaintiffs in this case demands, going so far as to approve a court's order compelling officials to levy state taxes to raise funds to open and operate desegregated public schools. *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 233-34 (1964).

Finally, it may not be at all inappropriate for the District Court to give even the exact relief specifically demanded in the complaint. Injunctions against unconstitutional police conduct have sometimes been issued. E.g., *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966). See also *Wolin v. Port of N.Y. Auth.*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968); *NAACP v. Thompson*, 357 F.2d 831 (5th Cir. 1966), *cert. denied*, 395 U.S. 820 (1967); *Houser v. Hill*, 278 F. Supp. 920

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(M.D. Ala. 1968); *Cottonreader v. Johnson*, 252 F. Supp. 492 (M.D. Ala. 1966); *Williams v. Wallace*, 249 F. Supp. 100 (M.D. Ala. 1965); *Local 309, United Furniture Workers v. Gates*, 75 F. Supp. 620 (N.D. Ind. 1948); *Refoule v. Ellis*, 74 F. Supp. 336 (N.D. Ga. 1947). See Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 Yale L.J. 143 (1968). Insofar as they are utilized in civil disorders, National Guard troops are no different in the eyes of the law, under due process, than civilian police personnel.

There is no "textually demonstrable commitment" to other branches to interfere with such relief. It is true that Article I, Section 8 of the Constitution gives Congress power to provide for organizing, arming, and disciplining the militia; but that has reference particularly to their equipment and training for use as a military force. The Constitution does not care whether or not states use militia manpower to control civil disorders, except that it requires that *if* states choose to do so they do so in compliance with due process of law. If a state wishes to use its militia for this domestic purpose, Article I, Section 8 cannot be read as giving Congress the last word in their training or equipment for such tasks. Furthermore, Congress' actions under that clause, like under every one of Congress' powers, is subject to the requirements of due process of law. The militia clause is *unlike* Article IV, Section 4, for example, which vests in the political branches the power to define the meaning of "republican government"; for Congress has not been granted the power to define the meaning of due process.

Accordingly, it may not be appropriate for the District Court to review the training of Ohio guardsmen to insure that they are effectively instructed of their rights and duties and liabilities as civilians in their role in controlling civil disorders. The same is true with respect to the equipment they are instructed to use on such duty. The court might find, for example, that high-powered, rapid-fire automatic rifles designed to deliver copper-clad bullets with deadly accuracy at a range over three miles are so ill-suited to the needs of any conceivable civil disorder that their use is incompatible with due process.

Whether or not the specific relief demanded with respect to training and equipment is relief that can be judicially granted,

however, the other relief described in this brief as called for by the allegations in the complaint can certainly be granted without any problems of justiciability or any other impediments. Rule 54(c), *Fed. Rules Civ. Pro.* provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

CONCLUSION

Petitioner in this case has suggested to this Court that "The power to prevent and suppress civil disorders is the most fundamental of powers." *Petition for Certiorari* at 9. This is unquestionably true; and in view of the frequent disorders that have occurred in recent years, it is an extremely important truth. But it is also true that the right to have civil disorders prevented or suppressed *by civilian force in compliance with the requirements of due process,* rather than by military force, is the most fundamental of rights, guaranteed by all the great documents of our liberty and redeemed by repeated struggles since the dawn of the common law. In her abuse of this most fundamental of powers, Ohio has ignored and destroyed this most fundamental of rights. That is the intolerable situation, a remedy for which is being sought in this case.

In his opinion in the Court of Appeals, Judge Celebrezze took pains to point out that while he did not think a court could give prospective relief he was satisfied that a court could make "an after-the-fact review of National Guard conduct which has allegedly deprived persons of their constitutional rights." Slip-sheet opinion at 24. "After-the-fact review" of any single event, however, simply cannot effectively establish sufficient respect for the due process principles that are here at stake. More than a score of after-the-fact cases, discussed in Part I of this brief and the sources there cited, have invoked the historic principles here examined and applied them to particular facts; and yet Ohio as well as other states continue to enact and utilize statutes, orders, rules and practices all at odds with the demands of due process.

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Furthermore, the sorry record that has been made in the efforts to vindicate these principles "after-the-fact" of the Kent State tragedy of 1970 demonstrates the inadequacy of that supposed remedy. Only days before he wrote his opinion in this case, Judge Celebrezze sat for arguments in *Krause v. Rhodes, Miller v. Rhodes,* and *Scheuer v. Rhodes* (No. 71-1622, 71-1623, and 71-1624, Sixth Circuit), actions under 42 U.S.C. §1983 (and other claims) for an after-the-fact accounting of the Kent shootings. But as demonstrated by Judge Celebrezze's own compelling dissent from the court's affirmance of the dismissals on the pleadings of those cases, on November 17, 1972, the hope of candid "after-the-fact" review in such emotion-charged cases is illusory. The majority in those cases closed its eyes to the precedents, holding that the suits alleging unconstitutional acts by state officers were barred by the Eleventh Amendment; contrived a novel rule of absolute personal privilege for executive officials; ignored those facts of which it could legitimately have taken judicial notice, and on pretext of such notice assumed facts contradictory to the allegations of the unanswered complaints; and even made outrageous accusations of "dissembling" on the part of plaintiffs' lawyers, for alleging facts which the majority, despite the lack of any trial, insisted were untrue.

Other efforts to secure an "after-the-fact" review of the Kent shootings have been no more successful. In *Krause v. Ohio,* 31 Ohio St. 2d 132, ____ N.E.2d ____ (1752), the Supreme Court of Ohio revived a long-discredited old notion of equal protection, and ignored the law's historic insistence upon the necessity for effective redress in a state's own courts for alleged constitutional wrongs, in order to maintain its sovereign immunity from suit on the Kent facts even though Ohio had foreclosed every possible alternative mode of judicial redress for those wrongs as well. Yet, on appeal, the United States Supreme Court did not even perceive any substantial federal question. *Krause v. Ohio,* No. 72-589 (Appeal dismissed, Dec. 11, 1972).

When the Kent State affair was investigated by an Ohio state grand jury, the specially appointed state prosecutors selectively withheld from the grand jury essential evidence which

had been accumulated by the Federal Bureau of Investigation, reviewed by the Department of Justice, and transmitted for the state grand jury's use, including the testimony of at least one guardsman and other evidence indicating that the claim of self-defense had been fabricated by guardsmen after the shooting. The state grand jury's report (the only official report by any investigatory body that has failed to find the shootings unwarranted and unjustified) was expunged by order of a federal court, *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio, E.D. 1971), *aff'd.* 450 F.2d 480 (6th Cir. 1971); and charges against twenty of the twenty-five persons (non-guardsmen) indicted by the state grand jury were dropped by the state itself for lack of evidence in December, 1971.

On representations from the Department of Justice that prosecutorial actions would be diligently pursued, the President's Commission on Campus Unrest in order not to interfere with such prosecutions chose not to utilize the power to grant immunity and compel testimony, which had been given it by congressional joint resolution, P.L. 91-334, 84 Stat. 429. See *Report of the President's Commission on Campus Unrest* at 234 (1970); Testimony of Commissioner James F. Ahearn, *Hearings on Presidential Commissions*, Senate Judiciary Committee Subcommittee on Administrative Practice and Procedure, 91st Cong., 1st sess., at 201 (1971). Even without exercising that power, however, the Commission found that the shootings by Ohio National Guardsmen were "unnecessary, unwarranted, and inexcusable." *Report, supra*, at 289. When more than a year passed without any federal prosecutorial action, the Chairman and several other members of that Commission publicly criticized the delay. One member declared that "It is inconceivable that the Department of Justice would refuse to convene a federal grand jury in Ohio on the basis of the Commission's conclusions supplemented by evidence developed by the FBI and the obvious miscarriages of justice occurring on the state level." Another member charged the administration with callousness and deliberate deceit in its handling of the Kent State matter. See *Hearings on Presidential Commissions, supra*, at 200-02, 217-18, 222 (1971).

Efforts to persuade the Department of Justice to permit a federal grand jury inquiry under 18 U.S.C. §§ 241 and 242,

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have been fruitless. The investigatory findings have been kept secret. While public release of the apparently incriminating evidence compiled by the Federal Bureau of Investigation may be inappropriate, 5 U.S.C. § 552(c) forbids withholding it from Congress, except on a claim of executive privilege. No assertion of executive privilege with respect to this material has been made in compliance with the rules established by President Nixon for the invocation of executive privilege; and without compliance with these rules no valid claim of privilege can be made. See Testimony of Mr. Rehnquist on *Executive Privilege: The Withholding of Information by the Executive, Hearing before the Subcommittee on Separation of Powers, Senate Judiciary Committee*, at 440-41, 92nd Cong., 1st Sess. (1971). Nevertheless the repeated requests of a United States Senate Subcommittee for access to this material have been denied by the Attorney General in violation of U.S.C. § 552(c). See *Hearings on the Nominating of Ralph E. Erickson, Assistant Attorney General, before Senate Judiciary Committee*, at 3-13, 92nd Cong., 2d Sess. (1972); letters of request from Senator Edward Kennedy on behalf of Senate Subcommittee on Administrative Practice and Procedure, dated June 25, 1971, August 26, 1971, October 28, 1971, February 9, 1972, and August 17, 1972; replies dated October 22, 1971 and January 12, 1972, in the files of Senator Kennedy.

Moreover, the changes that were made in National Guard training for civil disorders in response to the events of 1970 and the recommendations of the President's Commission on Campus Unrest, have been largely negated by more recently implemented policies of the Army Chief of Staff. See the *Comptroller General's Report to the Congress, Training and Equipping the Army National Guard for Maintaining Order During Civil Disturbances.* Report No. B-160779 of the Comptroller General (Sept. 8, 1972). Even prior to this recent negation, the changes which had been made in National Guard policy did not satisfy the requirements of due process documented in this brief.

These fruitless efforts are recounted here for the purpose of underscoring the compelling necessity for giving appropriate judicial relief in the present case. They demonstrate, all too

pathetically, that the conceivable alternatives to this kind of judicial action as a means of effectively restoring the rule of due process in National Guard control of civil disorders cannot realistically be expected to succeed. If relief is not given in this present proceeding, effective relief cannot be expected to be found at all.

Choice more than destiny controls the fate of nations; and history must inform that choice. When Charles I used military prerogative to suppress riots in England, it led to the Petition of Right; and when the common law judges eviscerated that Petition's guarantee by their decision in *The Case of Ship Money, The King v. Hampden, supra,* it was only five years until 1642, and barely a decade until 1648. When General Gage used military force against dissident colonists, they made a symbol of the Boston Massacre, which occurred exactly two centuries before the tragedy at Kent State; and when King George responded with toughening measures to bring the colonists into line, revolution flared within six years.

There are elements of unrest still simmering in our country, as volatile as any that were present in the colonies or in seventeenth century England. We must not allow rhetoric to displace our reason; but rationalization that ignores human passion is unreason. This case deals with the very same issue that has catalyzed revolution before; and as Patrick Henry said in his Speech on the Stamp Act to the Virginia Convention on March 23, 1775: "I know of no way of judging the future but by the past."

Respectfully submitted,

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